

No. 12098

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United States  
Court of Appeals  
for the Ninth Circuit

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FELICE DI PROSPERO,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

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Transcript of Record

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Petition to Review a Decision of The Tax Court  
of the United States

FILED  
JAN 17 1949



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**Court of Appeals**  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## APPEARANCES

For Petitioner:

HENRY J. ROGERS, Esq.,

For Respondent:

R. C. WHITLEY, Esq.

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Docket No. 17821

FELICE DI PROSPERO,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

## DOCKET ENTRIES

1948

Apr. 9—Petition received and filed. Taxpayer notified. Fee not paid.

Apr. 14—Fee paid—check.

Apr. 15—Copy of petition served on General Counsel.

May 6—Entry of appearance of Henry J. Rogers, as counsel filed.

June 2—Motion to dismiss for lack of jurisdiction filed by General Counsel.

June 4—Hearing set July 7, 1948 on respondent's motion.

1948

- July 7—Hearing had before Judge Turner on respondent's motion. Motion granted. Proceeding dismissed for lack of jurisdiction.
- July 8—Order of dismissal entered. Judge Turner, Division 8.
- Sept. 30—Petition for review by U. S. Court of Appeals for the 9th Circuit filed by taxpayer. 11/4/48 Acceptance of service of petition for review acknowledged thereon.
- Oct. 25—Designation of record filed by taxpayer. 11/4/48 Acceptance of service of designation acknowledged thereon. [1\*]

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\* Page numbering appearing at foot of page of original certified Transcript of Record.



The Tax Court of the United States

Docket No. 17821

FELICE DI PROSPERO,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Income tax Division, Room 623, Serial No. Sr:AT:SvJ) dated January 9, 1948, and as a basis of his proceeding alleges as follows:

1. The petitioner is an individual with residence at 3191 Washington Street, San Francisco, California. The return for the period here involved was filed with the collector for the First District of California.

2. The notice of deficiency (a copy of which is attached and marked Exhibit "A") was mailed to the petitioner on January 9, 1948.

3. The taxes in controversy are income taxes for the calendar years 1942 to 1945 inclusive and in the amount of \$1,945.61, including penalty in the amount of \$648.53. [2]

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) Assets, December 31, 1941, are deficient in the amount of \$500.00;

(b) Liabilities, December 31, 1945, are deficient in the amount of \$999.02;

(c) Living Expenses, 1942 to 1945, are over-estimated by the collector, in the amount of \$1,600.00.

5. The facts upon which the petitioner relies as the basis of this proceeding, are as follows:

A. The items described below have been set forth in affidavits, dated September 16, 1946, and said affidavits, were presented to the collector, who disallowed same:

(a) Furniture purchases in the amount of \$500 was omitted, through no fault of the petitioner, from the assets in 1941, thereby increasing the net worth \$500 as of December 31, 1941.

(b) The 1945 income tax in the amount of \$793.50 was omitted from the liabilities; also, property tax in the amount of \$205.52 for the year 1945, was omitted from the liabilities as of December 31, 1945. [3]

(c) The living expenses for the four year period should be \$2,400, and not \$4,000, as estimated by the collector.

(d) The addition for taxes paid for the year 1945 should be reduced by \$793.50 as this portion of the tax was not paid until the year 1946.

B. As a result of the above errors,

(1) The increase in net worth from December 31, 1941, to December 31, 1945, should be reduced by \$1,499.02;

(2) The addition for living expenses and taxes paid should be reduced by \$2,393.50.

Wherefore, the Petitioner prays that this Court may hear the proceeding and reduce the tax deficiency by \$1,527.81, to \$417.80.

/s/ FELICE DI PROSPERO,

/s/ H. J. ROGERS,

Attorney for Petitioner. [4]

State of California,  
City and County of San Francisco—ss.

Felice Di Prospero, being duly sworn, says that he is the petitioner above-named; that he has read the fore-going petition, or had the same read to him, and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that those he believes to be true.

/s/ FELICE DI PROSPERO.

Subscribed and sworn to before me this 6th day of April, 1948.

/s/ AGNES M. COLE,

Notary Public in and for the City and County of  
San Francisco, State of California. [5]

## EXHIBIT "A"

Treasury Department  
Internal Revenue Service  
100 McAllister Street Building  
San Francisco 2, Calif.

January 9, 1948.

Office of the Collector First District of California

In Replying Refer To

Income Tax Division  
Audit Section Room 623  
Serial No. SR:AT:SvJ

Felice Di Prospero  
3191 Washington St.  
San Francisco, Calif.

You are advised that the determination of your income tax liability for the taxable years 1942, (\$8.62); 1943, (\$229.65); 1944, (\$279.00) and 1945, (\$1,428.34) amounting to a total deficiency of \$1,945.61 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within ninety days (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day) from the date of mailing of this letter, you may file a petition with the Tax Court of the United States for a redetermination of the deficiency.

Should you not desire to file a petition, you are

requested to execute the enclosed form and forward it to the Collector of Internal Revenue, 100 McAllister Street, San Francisco 2, California, for the attention of Audit Section. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GEORGE J. SCHOENEMAN,  
Commissioner.

By JAMES G. SMYTH,  
Collector of Internal Revenue.

Enclosures: Statement Form Waiver.

[Endorsed]: T.C.U.S. Filed April 9, 1948. [6]

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The Tax Court of the United States  
Washington

Docket No. 17821

FELICE DI PROSPERO,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

ORDER OF DISMISSAL

This proceeding came on for hearing July 7, 1948, at Washington, D. C., pursuant to notice,

upon a motion to dismiss filed by the respondent. It appearing from the evidence submitted and from the record presented that the petition for redetermination was not filed with the Court within the 90 days provided by the Revenue Act of 1926, as amended by section 501 of the Revenue Act of 1934, it is

Ordered that the respondent's motion is granted and the proceeding is dismissed for lack of jurisdiction.

/s/ BOLON B. TURNER,  
Judge.

Entered July 8, 1948.

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[Title of Tax Court and Cause.]

### PETITION FOR REVIEW

Felice Di Prospero, petitioner, hereby files petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the order of dismissal of the Tax Court of the United States, dated July 7, 1948, Docket No. 17821, copy of which hereto attached.

1. The petitioner is an individual with residence at 3191 Washington Street, San Francisco, California. The jurisdiction of this Court is invoked under section 1141 of the Internal Revenue Code.

2. My petition to the Tax Court of the United States was attempted to be delivered for filing within the 90 days as provided by the Revenue Act of 1926 and Section 501 of 1934, but the Tax

Court was found closed on the ninetieth day, at the time when the petition was delivered for filing, as evidenced by letter from the United States Post Office, Washington, D. C., dated July 9, 1948, photostatic copy of which, herewith enclosed and marked Exhibit A.

3. Exhibit "B", copy of letter of the Treasury Department Internal Revenue Service, dated January 9, 1948, copy of which herewith enclosed and marked Exhibit "B", in paragraph No. 3, states that within 90 days (not counting Saturdays, Sunday or [8] legal holidays in the District of Columbia as the 90th day) from date of mailing of that letter, petition could be filed. No limitation of time or hours within which to file the petition on the 90th day was mentioned; therefore, the petition for re-determination of the deficiency was first delivered for filing on the ninetieth day.

Wherefore, the petitioner prays for a review of the Order of Dismissal.

/s/ FELICE DI PROSPERO.

Enclosed: Copy order of dismissal, letter U. S. Post Office (Exhibit "A"), copy letter Internal Revenue (Exhibit "B"). [9]

State of California,  
City and County of San Francisco—ss.

Felice Di Prospero, being duly sworn, says that he is the petitioner above-named; that he has read the foregoing petition, or had the same read to him, and is familiar with the statements contained

therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that those he believes to be true.

/s/ FELICE DI PROSPERO.

Subscribed and sworn to before me this 28th day of September, 1948.

(Seal) /s/ NANCY EVERETT,  
Notary Public in and for the City and County of  
San Francisco, State of California.

My Commission Expires Nov. 3, 1950.

Receipt of a copy of the within Petition for Review is hereby admitted this Fourth day of November, 1948.

/s/ CHARLES OLIPHANT,  
Chief Counsel,  
Bureau of Internal Revenue.

[Title of Tax Court and Cause.]

#### ORDER OF DISMISSAL

This proceeding came on for hearing July 7, 1948, at Washington, D. C., pursuant to notice, upon a motion to dismiss filed by the respondent. It appearing from the evidence submitted and from the record presented that the petition for re-determination was not filed with the Court within the 90 days provided by the Revenue Act of 1926, as amended by section 501 of the Revenue Act of 1934, it is



Ordered that the respondent's motion is granted and the proceeding is dismissed for lack of jurisdiction.

/s/ BOLON B. TURNER,  
Judge.

[11]

EXHIBIT "A"

United States Post Office  
Washington 13, D. C.

Mr. Henry J. Rogers, Atty. at Law,  
111 Sutter Street,  
San Francisco 4, Calif.

In reply refer to RD-s, Telephone Sterling  
5100, Extension 368.

My dear Sir:

Reference is made to your letter of June 29, 1948, relative to delivery of air mail, special delivery, registered article No. 756231, mailed by you April 6, 1948, addressed to the Tax Court of the U. S., Clerks Office, Washington, D. C.

Insofar as can be ascertained the above article was received in this office around 2:45 p.m., April 8, 1948, and left the office by Special Delivery Messenger at 4:45 p.m. that day for delivery to addressee. When the Messenger arrived at the address of the Tax Court with the article, he found the office closed.

The register was delivered the next morning,

being signed for by the authorized agent of the addressee at 8:00 a.m., April 9, 1948.

Very truly yours,

/s/ .....,

Acting Postmaster.

[12]

EXHIBIT "B"

Treasury Department  
Internal Revenue Service  
100 McAllister Street Building  
San Francisco 2, California

January 9, 1948

Office of the Collector First District of California.

In Replying Refer to

Income Tax Division  
Audit Section Room 623  
Serial No. SR:AT:SvJ

Felice Di Prospero  
3191 Washington St.  
San Francisco, Calif.

You are advised that the determination of your income tax liability for the taxable years 1942, (\$8.62); 1943, (\$229.65); 1944, (\$279.00) and 1945, (\$1,528.34) amounting to a total deficiency of \$1,945.61 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within ninety days (not counting Saturday, Sun-

day or legal holiday in the District of Columbia as the ninetieth day) from the date of mailing of this letter, you may file a petition with the Tax Court of the United States for a redetermination of a deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Collector of Internal Revenue, 100 McAllister Street, San Francisco 2, California, for the attention of Audit Section. The signing and filing of this will expedite the closing of your return by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GEORGE J. SCHOENEMAN,  
Commissioner.

By JAMES G. SMYTH,  
Collector of Internal Revenue.

Enclosures: Statement Form Waiver.

[Endorsed]: Filed Sept. 30, 1948.

[13]

[Title of Tax Court and Cause.]

DESIGNATION OF ENTIRE RECORD, PROCEEDINGS AND EVIDENCE TO BE TRANSMITTED TO THE CIRCUIT COURT OF APPEALS

To the Clerk of the Tax Court of the United States:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, copies duly certified as correct of the following documents and records in the above-entitled proceeding in connection with the Petition for Review by the Circuit Court of Appeals for the Ninth Circuit, heretofore filed by Felice Di Prospero:

1. Docket entries of all proceedings before the Tax Court.
2. Pleadings before the Tax Court:
  - (a) Original petition, delivered for filing 8 April, 1948. (Filed 9 April, 1948.)
  - (b) Order of dismissal, 7 July, 1948.
3. Petition for Review, together with proof of service of notice of filing, and of service of a copy, of Petition for Review, and Exhibit "A" (letter U. S. Post Office), and Exhibit "B" (letter Internal Revenue).
4. This designation of entire record, proceedings and evidence to be contained in the printed record on review.

Said transcript to be prepared, certified and transmitted, as required by law and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

/s/ FELICE DI PROSPERO,  
Petitioner on Review.

Acknowledged before me this 21st day of October, 1948.

(Seal) /s/ CATHERINE E. KEITH,  
Notary Public in and for the City and County of  
San Francisco, State of California.

My Commission Expires Dec. 16, 1950.

Receipt of a copy of the within designation is hereby admitted this Fourth day of November, 1948.

/s/ CHARLES OLIPHANT,  
Chief Counsel, Bureau of Internal Revenue.

[Endorsed]: T.C.U.S. Filed Oct. 25, 1948. [14]

[Title of Tax Court and Cause.]

### CERTIFICATE

I, Victor S. Mersch, clerk of The Tax Court of the United States do hereby certify that the foregoing pages, 1 to 14, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praeceptum in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 5th day of November, 1948.

(Seal)            /s/ VICTOR S. MERSCH,  
Clerk, The Tax Court of the United States.

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[Endorsed]: No. 12098. United States Court of Appeals for the Ninth Circuit. Felice Di Prospero, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed November 22, 1948.

                  /s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

In the United States Court of Appeals  
For the Ninth Circuit

Docket No. 12098

FELICE DI PROSPERO,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

MOTION FOR EXTENSION OF TIME FOR  
TRANSMITTING RECORD ON REVIEW

Whereas, the petitioner on review on September 30, 1948, filed its petition for review from a decision of The Tax Court of the United States and notice thereof and the time for transmitting the record on review will expire, under Rule 30, on November 8, 1948, and

Whereas, petitioner on review has submitted a narrative statement of evidence to counsel for respondent and said statement has not been settled, and therefore the record on review cannot be completed and transmitted to this Honorable Court within the time allowed because of conditions beyond the control of petitioner, and additional time is required to complete file and transmit the record to this Honorable Court.

Now, Therefore, the petitioner for review respectfully moves that the time within which to

complete and transmit the record on review in this proceeding be extended to and including December 15, 1948.

/s/ FELICE DI PROSPERO,  
Petitioner on Review.

So Ordered: Time extended to Dec. 1, 1948.

/s/ WILLIAM DENMAN,  
Chief Judge, U. S. Court of Appeals for the Ninth  
Circuit.

State of California,  
City and County of San Francisco—ss.

Felice Di Prospero, being first duly sworn, deposes and says:

That he is the true petitioner on review as filed with the U. S. Tax Court on September 30, 1948.

That he filed with the U. S. Tax Court a designation of entire record, proceedings and evidence to be transmitted to this Honorable United States Court of Appeals for the Ninth District.

That he served copies of petition for review and copies of designation of entire record, proceedings and evidence on Charles Oliphant, Counsel for Respondent on Review, on Theron L. Caudle, Assistant Attorney General, and on the Commissioner of Internal Revenue.

/s/ FELICE DI PROSPERO,  
Petitioner on Review.



Subscribed and sworn to before me this day of  
November 5, 1948.

(Seal)            /s/ NANCY EVERETT,  
Notary Public in and for the City and County of  
San Francisco, State of California.

My Commission Expires Nov. 3, 1950.

[Endorsed]: Filed November 6, 1948. Paul P.  
O'Brien, Clerk.

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[Title of U. S. Court of Appeals and Cause.]

#### STATEMENT OF POINTS

Herewith, Felice Di Prospero, Petitioner, intends  
to rely on the following points:

1. The Tax Court erred in dismissing for lack of  
jurisdiction original petition dated 6 April 1948,  
Docket No. 17821, in which above-named petitioner  
prayed to the Honorable Tax Court to hear proceed-  
ings and reduce tax deficiency for the years 1941 to  
1945, inclusive, as determined by the Commissioner  
of Internal Revenue in letter dated 9 January 1948,  
insofar as petition was attempted to be delivered for  
filing within the 90 days, but the Tax Court was  
found closed on the ninetieth day, at the time when  
the petition was attempted to be delivered, as evi-  
denced by letter from the United States Post Office,  
Washington, D. C., dated 9 July 1948.

/s/ FELICE DI PROSPERO.

Subscribed and sworn to before me this 29th day of November, 1948.

(Seal)           /s/ CATHERINE E. KEITH,  
Notary Public in and for the City and County of  
San Francisco, State of California.

My commission expires December 16, 1950.

[Endorsed]: Filed November 29, 1948. Paul P. O'Brien, Clerk.

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[Title of U. S. Court of Appeals and Cause.]

PETITIONER'S DESIGNATION OF ENTIRE  
RECORDS TO BE PRINTED

To the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit:

Felice Di Prospero, the Petitioner on Review herein, pursuant to its Petition for Review of the decision of the Tax Court of the United States entered 7 July 1948, Docket No. 17821, designates the entire transcript for printing.

/s/ FELICE DI PROSPERO.

Subscribed and sworn to before me this 29th day of November, 1948.

(Seal)           /s/ CATHERINE E. KEITH,  
Notary Public in and for the City and County of San  
Francisco, State of California.

My commission expires December 16, 1950.

[Endorsed]: Filed November 29, 1948. Paul P. O'Brien, Clerk.